

## Attachment 1

### **Effect of SWANCC Supreme Court Decision on Water Bodies in Indiana**

On January 9, 2001, the United States Supreme Court issued a decision<sup>1</sup> affecting the federal government's jurisdiction under section 404 of the Clean Water Act (CWA). The Supreme Court held that the United States Army Corps of Engineers exceeded its authority under the CWA when it determined that abandoned intrastate gravel pits were "waters of the United States" on the sole basis that the waters were used as habitat by migratory birds.

IDEM is awaiting further guidance to be issued by the United States Environmental Protection Agency and the Corps of Engineers as to how they will implement the SWANCC decision. In the meantime, the public should be aware of how the case affects waters in Indiana.

First, many isolated water bodies including isolated wetlands (those with no hydrological connection to other waters or interstate commerce connection) that were formerly considered to be waters of the United States no longer will be. As a result, a section 404 permit from the Corps of Engineers (and consequently a section 401 state water quality certification) will not be required in those instances. *However, the SWANCC decision has no bearing on whether these water bodies are "waters" of the state subject to state law.* Therefore, isolated water bodies, including isolated wetlands, will not cease to be waters of the state simply because they are no longer waters of the United States.

Second, waters of the state are subject to water quality standards (which are set forth in 327 IAC 2) and other state laws and regulations. Discharges of dredged or fill material to waters of the state, including wetlands, are likely to violate these provisions.

Third, Indiana rules prohibit any discharge of a pollutant (which includes dredged or fill material) into waters of the state from a point source discharge (which includes bulldozers and backhoes) unless either the discharger has obtained an NPDES permit or an exclusion applies. One of the current exclusions is for discharges of dredged or fill material into waters of the state that are regulated under section 404 of the CWA. However, this exclusion does not apply to discharges into waters that are no longer subject to section 404 of the CWA. Therefore, a discharge of dredged or fill material into the isolated waterbodies or isolated wetlands is subject to the prohibition on discharging without an NPDES permit.

Fourth, IDEM may pursue enforcement actions against persons who discharge pollutants, including dredged and fill material, into waters of the state in violation of state regulatory or statutory provisions. These persons are also subject to third party actions.

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<sup>1</sup>Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers, 121 S.Ct. 675 (2001) ("SWANCC").